Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-108–12 OF 2016(S)
ZULKEFLI PCA, HASAN LAH, AZIAH ALI, PRASAD ABRAHAM AND JEFFREY TAN FCJJ
12 APRIL 2018

Civil Procedure — Judgments and orders — Application to amend perfected order — Plaintiff under guise of 'clarification' applied to amend perfected order of trial court seven years after trial ended — Proposed amendments were substantive and substantial and were not mere clerical slips or omissions — Whether amendments could not be allowed as court was functus officio upon perfection of the order — Whether only scope for amendment was to correct any 'clerical mistakes' in the order due to accidental slips or omissions as permitted by O 20 r 11 of the Rules of Court 2012

The respondent sued the appellant in the High Court for breach of contract over the sale of two generators claiming that the generators were not able to produce 1,000 KW of electricity each as promised. In its amended statement of claim, the respondent sought an order ('prayer (i)') that the appellant repay the respondent RM264,000 and also pay for the cost of diesel the respondent had incurred to operate other generators to make up for the power deficit in the appellant's generators. Further or alternatively, the respondent sought orders ('prayers (ii) and (iii)') that the appellant bear the cost of replacing the generators that it had sold the respondent with new ones and install them at the respondent's factory. At the end of the trial, the Court entered judgment for the respondent and ordered damages to be assessed by the deputy registrar ('DR'). The sealed order of the trial judge stated that the damages to be assessed should 'reflect prayers (ii) and (iii) ...'. The Court of Appeal ('COA') dismissed the appellant's appeal against the trial court's verdict and leave to appeal further to the Federal Court was denied. At the conclusion of the assessment of damages, the DR ordered the appellant to pay the respondent RM3,382,222.09. On the appellant's appeal, the judge in chambers set aside the award and reduced the figure to RM264,000. The COA affirmed that decision and leave to appeal further to the Federal Court was denied. By that time, seven years had passed since the trial court's verdict. Yet, the respondent filed a new draft order in the High Court 'to reflect the actual orders made by the trial judge'. This was despite the fact the trial judge's order had already been perfected and was used in the assessment of damages proceedings and had also gone through the appeal process. The proposed draft order sought to include verbatim prayer (i) and prayer (iii). The new judge who heard the respondent's application dismissed

the same holding, inter alia, that since the trial judge's order had been perfected, the court was functus officio and could not re-open or amend it, more so because what was proposed to be amended was not a clerical slip or mistake. On the respondent's appeal, the COA set aside the judge's decision and amended the trial court's order as proposed in the draft order. The COA held that based on the record, the trial judge had granted prayers (ii) and (iii); that both the DR and the judge in chambers had overlooked that fact and only dealt with the extra fuel cost the respondent had incurred but not the costs the respondent had expended to replace and install a new generator as set out in prayers (ii) and (iii). The appellant was granted leave by the Federal Court to appeal against the COA's decision.

Held, allowing the appeal, setting aside the COA's decision and restoring the order of the High Court:

(1) The High Court was right to refuse the respondent's application to amend the trial court's sealed order. The COA acted out of jurisdiction when it allowed the trial court's order as affirmed by the Federal Court to be re-opened. The trial court's order was no longer an order of a court lower in hierarchy to the Court of Appeal. For, once affirmed by the highest court, the trial judge's order demanded the respect and obedience of all parties and even all courts (see para 28).

(2) When both the respondent and the appellant had exhausted all possible avenues of appeal with regard to the order made by the judge-in-chambers on appeal from the DR's decision as well as the order of the trial judge made at the conclusion of the trial, those orders became final and conclusive and were amenable to the doctrine of res judicata. The trial judge's order and the order made by the judge in chambers became the truth between the parties and could not be re-opened or re-litigated. All litigation had to come to an end (see paras 20–21).

(3) The High Court was right to hold that when the trial judge's order was sealed, the Court became functus officio, save and except to correct 'clerical mistakes' or errors due to any accidental slip or omission (per O 20 r 11 of the Rules of Court 2012). The draft order, which proposed wholesale changes to the trial judge's order, was clearly not within the ambit of 'clerical mistakes or errors arising therein from any accidental slip or omission'. None of the authorities relied upon by the COA supported the proposition that the sealed order of the trial judge could be amended as per the draft order. Unless appealed against, an order of a trial court stood final, binding and conclusive as pronounced by the trial court. If appealed against, an order of the trial court stood final, binding and conclusive as pronounced by the higher or highest court (see paras 21–27).

(4) At the assessment of damages, the respondent had only claimed for RM3,382,222.09 as the extra cost of fuel it had incurred due to the under-performance of the two generators supplied by the appellant. To all intents and purposes, the respondent no longer pursued prayers (ii) and (iii). In his grounds of decision, the DR did note that the trial judge had granted judgment to the respondent with damages to be assessed to reflect prayers (ii) and (iii). But since the respondent's claim was only for the extra fuel cost, there was no reason for the DR to assess damages as ordered. If it felt the DR's assessment was wrong, the respondent should have appealed against his order, but it did not do so. The respondent could not then complain that prayers (ii) and (iii) were not considered. Only the appellant appealed against the DR's order. And even at the appeal, the respondent did not raise prayers (ii) and (iii) in its written submissions. The judge in chambers ruled that the DR did not exceed his jurisdiction in awarding the RM3,382,222.09 but held that the respondent had failed to prove the extra fuel cost. The appellant was nevertheless ordered to pay the respondent RM264,000 as that was the figure the appellant had offered to pay 'to restore the respondent to its original position as if the contract had been perfectly performed' (see paras 18–19).

[Bahasa Malaysia summary

Responden menyaman perayu di Mahkamah Tinggi untuk pelanggaran kontrak ke atas jualan dua penjana dengan mendakwa bahawa penjana-penjana tersebut setiap satu tidak dapat menghasilkan 1,000 KW seperti yang dijanjikan. Dalam penyataan tuntutan yang dipinda, responden memohon perintah ('permohonan (i)') bahawa perayu membayar semula kepada responden sebanyak RM264,000 dan juga membayar untuk kos diesel yang ditanggung oleh responden untuk menjalankan penjana-penjana lain untuk menampung defisit kuasa di dalam pejana-penjana perayu. Selanjutnya atau secara alternatif, responden memohon perintah-perintah ('permohonan (ii) dan (iii)') bahawa perayu menanggung kos menggantikan penjana-penjana yang ia jual kepada responden dengan penjana yang baru dan memasangnya di kilang responden. Pada akhir perbicaraan, mahkamah memasukkan penghakiman bagi responden dan memerintahkan ganti rugi ditaksirkan oleh timbalan pendaftar ('TP'). Perintah dimeterai oleh hakim perbicaraan menyatakan bahawa ganti rugi yang ditaksirkan patut 'reflect prayers (ii) and (iii) …'. Mahkamah Rayuan ('MR') menolak rayuan perayu terhadap keputusan mahkamah perbicaraan dan izin untuk merayu selanjutnya kepada Mahkamah Persekutuan dinafikan. Pada akhir taksiran ganti rugi, TP memerintahkan perayu membayar kepada responden sejumlah RM3,382,222.09. Atas rayuan perayu, hakim dalam kamar mengetepikan award tersebut dan mengurangkan jumlah kepada RM264,000. MR mengesahkan bahawa keputusan dan izin selanjutnya kepada Mahkamah Persekutuan dinafikan. Pada masa itu, tujuh tahun telah berlalu semenjak

keputusan mahkamah perbicaraan. Tetapi, responden masih memfailkan perintah draf baru di Mahkamah Tinggi 'to reflect the actual orders made by the trial judge'. Ini dibuat meskipun fakta bahawa perintah hakim perbicaraan telah dimeterai dan digunakan di dalam taksiran prosiding ganti rugi dan juga telah melalui proses rayuan. Perintah draf yang dicadangkan memohon untuk memasukkan permohonan verbatim (i) dan permohonan (iii). Hakim yang baru yang mendengar permohonan responden menolak keputusan yang sama, antara lain, bahawa memandangkan perintah hakim perbicaraan telah dimeterai, mahkamah adalah functus officio dan tidak boleh dibuka semula atau memindanya, lebih lagi kerana apa yang dicadangkan untuk dipinda bukan kesilapan perkeranian. Atas rayuan responden, MR mengetepikan keputusan hakim dan meminda perintah mahkamah perbicaraan seperti yang dicadangkan di dalam perintah draf yang dicadangkan. MR memutuskan bahawa berdasarkan atas rekod, hakim perbicaraan telah membenarkan permohonan (ii) dan (iii); bahawa kedua-dua TP dan hakim dalam kamar telah tertinggal fakta tersebut dan hanya berurusan dengan kos minyak lebih yang ditanggung oleh responden tetapi bukan kos yang digunakan oleh responden untuk menggantikan semula dan memasang penjana baru seperti yang ditetapkan di dalam permohonan (ii) dan (iii). Perayu diberikan izin oleh Mahkamah Persekutuan untuk merayu terhadap keputusan MR.

Diputuskan, membenarkan rayuan, mengetepikan keputusan MR dan membaiki perintah Mahkamah Tinggi:

(1) Mahkamah Tinggi adalah betul untuk menolak permohonan responden untuk meminda perintah yang dimeterai mahkamah perbicaraan. MR bertindak di luar bidang kuasa apabila ia membenarkan perintah mahkamah perbicaraan seperti yang disahkan oleh Mahkamah Persekutuan untuk dibuka semula. Perintah mahkamah perbicaraan tidak lagi perintah mahkamah rendah di dalam hierarki ke Mahkamah Rayuan. Kerana, apabila saja disahkan oleh mahkamah yang tertinggi, perintah hakim perbicaraan menuntut penghormatan dan ketaatan daripada kesemua pihak dan juga kesemua mahkamah (lihat perenggan 28).

(2) Apabila kedua-dua responden dan perayu telah menggunakan kesemua cara rayuan berkenaan kepada perintah yang dibuat oleh hakim dalam kamar atas rayuan daripada keputusan TP dan juga perintah hakim perbicaraan yang dibuat pada akhir perbicaraan, perintah-perintah tersebut menjadi muktamad dan tidak dapat dipertikaikan dan adalah terbuka kepada doktrin res judicata. Perintah hakim perbicaraan dan perintah yang dibuat oleh hakim dalam kamar menjadi benar di antara pihak-pihak dan tidak dapat dibuka semula atau dilitigasi semula. Kesemua litigasi perlu sampai kepenghujung (lihat perenggan 20–21).

(3) Mahkamah Tinggi adalah betul untuk memutuskan bahawa perintah

hakim perbicaraan dimeterai, mahkamah menjadi functus officio, selamat dan kecuali untuk membetulkan 'clerical mistakes' atau kesilapan akibat apa-apa yang tertinggal atau tidak dimasukkan ((mengikut A 20 k 11 Kaedah-Kaedah Mahkamah 2012). Perintah draf, yang mana mencadangkan perubahan serentak kepada perintah hakim perbicaraan, jelas bukan dalam lingkungan 'clerical mistakes or errors arising therein from any accidental slip or omission'. Tidak satu pun autoriti yang digunapakai oleh MR menyokong cadangan bahawa perintah yang dimeterai oleh hakim perbicaraan boleh dipinda seperti perintah draf tersebut. Kecuali ia dirayukan, perintah mahkamah perbicaraan adalah muktamad, mengikat dan tidak dapat dipertikaikan seperti yang diumumkan oleh mahkamah perbicaraan. Jika ia dirayukan, perintah mahkamah perbicaraan adalah muktamad, mengikat dan tidak dapat dipertikaikan seperti yang diumumkan oleh mahkamah tertinggi (lihat perenggan 21–27).

(4) Semasa penaksiran ganti rugi, responden hanya menuntut bagi RM3,382,222.09 sebagai kos tambahan minyak yang ditanggungnya oleh kerana dua penjana yang dibekalkan oleh perayu tidak berfungsi. Pada dasarnya, responden bukan lagi memburu permohonan (ii) dan (iii). TP dalam alasan-alasan keputusannya telah memberi perhatian bahawa hakim perbicaraan telah memberikan penghakiman kepada responden dengan ganti rugi akan ditaksirkan untuk menggambarkan permohonan-permohonan (ii) dan (iii). Tetapi memandangkan tuntutan responden hanya untuk kos minyak tambahan, tidak terdapat alasan untuk TP menaksir ganti rugi seperti diperintahkan. Jika ia berasa penaksiran TP adalah salah, responden patut merayu terhadap perintahnya, tetapi ia tidak berbuat sedemikian. Responden dengan itu tidak dapat mengadu terhadap perintah TP. Dan semasa rayuan juga, responden tidak membangkitkan permohonan-permohonan (ii) dan (iii) tidak dipertimbangkan. Hanya perayu merayu terhadap perintah TP. Dan semasa rayuan juga, responden tidak membangkitkan permohonan-permohonan (ii) dan (iii) dalam penghujahan bertulisnya. Hakim dalam kamar memutuskan bahawa TP tidak melebihi bidang kuasanya dalam mengawardkan RM3,382,222.09 tersebut tetapi memutuskan bahawa responden telah gagal untuk membuktikan kos minyak tambahan. Perayu walau bagaimanapun diperintahkan untuk membayar responden sebanyak RM264,000 memandangkan ia adalah jumlah yang ditawar untuk dibayar oleh perayu 'to restore the respondent to its original position as if the contract had been perfectly performed' (lihat perenggan 18–19).]

Notes

For cases on application to amend, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5500–5501.

Cases referred to

Armitage v Parsons [1908] 2 KB 410, CA (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Gist (a person of unsound mind), In Re [1904] 1 Ch 398, CA (refd)
Gordon-Smith v Peizer (1921) 65 Sol Jo 607, KBD (refd)
Henderson v Henderson [1843-60] All ER Rep 378; (1843) 3 Hare 100 (refd)
Henry William Hatton v Hugh Harris [1892] AC 547, HL (refd)
Hession v Jones [1914] 2 KB 421 (refd)
Hip Foong Hong v Neotia and Company [1918] AC 888, PC (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Jonesco v Beard [1930] AC 298, HL (refd)
Kelsey and Others v Doune [1912] 2 KB 482, CA (refd)
Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd [2011] 6 MLJ 788, CA (refd)
Malaysia Borneo Finance Corp (M) Bhd v Malayan Produce Co Sdn Bhd & Anor [2000] 5 MLJ 352, HC (refd)
Ooi Bee Tat @ Ooi Bee Lee v Ooi Bee Tat & Sons Sdn Bhd & Anor [1999] 5 MLJ 10, HC (refd)
Pearlman (Veneers) SA (Pty) Ltd v Bartels [1954] 3 All ER 659; [1954] 1 WLR 1457, CA (refd)
St Nazaire Company, In Re (1879) 12 Ch D 88, CA (refd)
Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd [1991] 2 MLJ 417, HC (refd)
Thynne (Marchioness of Bath) v Thynne (Marquess of Bath) [1955] 3 All ER 129; [1955] P 272, CA (refd)
Tiew Kun @ Tiew Boon Eu v Tneu Seng Bee & Ors and another appeal [2010] 2 MLJ 213, CA (refd)
Yung Chen Wood Industries Sdn Bhd v Scott & English (M) Sdn Bhd [2016] 12 MLJ 180, CA (refd)
Yung Chen Wood Industry Sdn Bhd v Scott & English (M) Sdn Bhd [2006] 7 MLJ 57, HC (refd)

Legislation referred to

Contracts Act 1950 s 74
Rules of Court 2012 O 20 r 11, O 42 r 13
Rules of the High Court 1980 O 20 r 11
Rules of the Supreme Court 1891 [IE] Order XXVIII r 11
Rules of the Supreme Court 1957 O 28 r 11

Norbert Yapp (Eow Ee Pei with him) (Norbert Yapp & Assoc) for the appellant.
Edwin Tsen (Tan Pang Tsen & Co) for the respondent.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] On 10 October 2017, we heard and unanimously allowed this appeal. We set aside the order of the Court of Appeal dated 19 May 2014 and restored the order of Douglas Cristo Primus Sikayun JC, as he then was, dated 18 September 2013. We now give our reasons for our decision.

[2] Yung Chen Wood Industries Sdn Bhd ('the plaintiff') sued Scott & English (M) Sdn Bhd ('the defendant') for breach of contract and conditions and warranties arising from the sale of two generator sets by the defendant to the plaintiff, and prayed, in its amended statement of claim, for the following reliefs:

(a) an order that the defendant repay to the plaintiff a sum of RM264,000 and damages for diesel oil consumption for having to operate other generators sets to make up the power deficit of the generators sets for the duration of the life span of the two generators sets;

(b) further or in the alternative, for an order that the defendant do within one month from the date of judgment, replace the two generators sets with two brand new generator sets of similar make and specifications capable of actually performing up to a power rating of 1,000KW each and install and set up in running conditions the same at the plaintiff's factory at Seguntor, at the defendant's own costs inclusive of all incidental costs;

(c) or alternatively, for an order that the defendant do within one month from the date of judgment, supply install and set up in running condition at the plaintiff's factory at Seguntor another brand new generator set of similar make and specifications capable of actually producing at least 1,000KW to make up the power deficit of the two generator sets, at the defendant's own costs inclusive of all incidental costs; and

(d) damages and incidental costs involved in having to set up the new wiring, power lines connections, equipment installation, control panel network, etc in respect of additional generator sets to make up the power deficit of the two generators sets, to be assessed.

[3] At the conclusion of the trial, Linton Albert J, as he then was, held that 'the plaintiff has, on a balance of probabilities established that the defendant was in breach of its promise that the two units of generators would produce a total of 2,000 kilowatts and therefore liable to the damages occasioned by the breach'. Linton Albert J however held that the plaintiff was not entitled to the reliefs sought, save for damages.

> [9] Finally, I do not think that the plaintiff is entitled to the reliefs sought in the statement of claim other than damages because they have been abandoned in learned counsel's opening statement where it was stated thus:

> The plaintiff will be dealing with the issue of liability only at this trial and damages to be assessed upon finding of issue of liability against the defendant.
>
> [10] For the reasons and in the circumstances aforesaid, judgment is entered for the plaintiff with damages to be assessed by the deputy registrar and costs to be taxed unless agreed. Order accordingly.

(For the judgment of Linton Albert J, see *Yung Chen Wood Industry Sdn Bhd v Scott & English (M) Sdn Bhd* [2006] 7 MLJ 57.)

[4] But before the learned deputy registrar ('DR') could assess damages, the plaintiff successively applied to Linton Albert J to clarify that 'the plaintiff had not abandoned prayers (ii) and (iii)'. The sealed order (encl 99 in the High Court) consequently read:

> It is this day ordered that judgment be entered against the defendant and damages be assessed by the deputy registrar to reflect prayers (ii) and (iii) of the writ of summons and costs to the plaintiff to be taxed unless agreed.

[5] The defendant appealed (S-02–800 of 2006) to the Court of Appeal. The Court of Appeal dismissed the appeal. The Federal Court also dismissed the defendant's application (08(f)-102 of 2009) for leave to appeal. Thereafter, the plaintiff moved the learned DR to assess damages. In his opening address to the learned DR, learned counsel for the plaintiff informed that the order stated that damages should reflect prayers (ii) and (iii). On 22 January 2009, the learned DR awarded RM3,382,222.09 together with interest at the rate 8%pa to the plaintiff.

[6] Against that order of the learned DR, the defendant appealed to judge in chambers. On 10 December 2009, Yew Jen Kie JC, as she then was, set aside the award of RM3,382,222.09 and awarded RM264,000 to the plaintiff. The defendant paid that RM264,000 to the plaintiff.

[7] On 31 December 2009, against that order dated 10 December 2009, the plaintiff appealed (S-03(IM)-52 of 2010) to the Court of Appeal. On 12 December 2012, the Court of Appeal dismissed the plaintiff's appeal and affirmed the decision of Yew Jen Kie JC. On 26 March 2013, the Federal Court dismissed the plaintiff's application (08(f)-26–01 of 2013) for leave to appeal against the order of the Court of Appeal dated 12 December 2012.

[8] Where all else had failed, the plaintiff reverted to the High Court and applied 'to seal the draft order to reflect the actual orders made by the trial judge (Linton Albert J, as he then was) under judgment dated 6 July 2006'. Douglas Cristo Primus Sikayun JC, who heard that application, related in his judgment dated 18 September 2013 that the draft order (draft order) read:

(a) that the defendant repay the plaintiff a sum of RM264,000 and damages for diesel oil consumption for having to operate other generator sets to make up the power deficit of the two said generator sets for the duration of the life span of the two said generator sets; and

(b) that the defendant do within one month from the date of judgment supply install and set up in running condition at the plaintiffs' factory at Seguntor another brand new generator set of similar make and specifications capable of actually producing at least 1,000KW to make up the power deficit of the two said generator sets at the defendants own costs inclusive of all incidental costs.

[9] Douglas Cristo Primus Sikayun JC held that the judgment of Linton Albert J did not indicate that prayer (i) of the draft order or prayer (i) of the amended statement of claim was ever granted:

> From my reading of the written judgment of the trial judge [Linton Albert J] there is nothing in the judgment to indicate that prayer (i) of the plaintiff's amended statement of claim has been granted by the trial judge. In fact, after the clarification sought before the trial judge on 10 August 2006, the trial judge only recorded in the notes of proceeding that 'the damages to be assessed would hereby be ordered to reflect the act that prayers 2 and 3 were not abandoned'.
>
> It is pertinent to note that during the hearing of the appeal to judge in chambers ... the plaintiff already raised the issue about the terms of the judgment. On this issue, the learned JC (Yew Jen Kie JC) had noted as follows:
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> > Based on the notes of proceedings recorded on 11 August 2006, only Mr Edwin Tsen for the plaintiff appeared, defendant was absent. Learned trial judge said thus: the damages to be assessed would hereby be ordered to reflect the fact that the prayers 2 and 3 were not abandoned.
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> The learned JC further noted:
>
> > To my mind if the judge is minded to grant prayer (i) he would have expressly stated that the judgment in terms of prayer (i). By not stating so, the judgment is only for damages to be assessed and after the clarification, that damages to be assessed is to reflect that prayers 2 and 3 are not abandoned.

[10] Douglas Cristo Primus Sikayun JC furthermore held: (i) that given that the plaintiff had not appeal against the order of Linton Albert J and that the order dated 6 July 2006 was sealed and acted upon by the learned DR and Yew Jen Kie JC, whose decision was affirmed by the Court of Appeal and the Federal Court, the court was functus officio; (ii) that pursuant to O 42 r 13 of the Rules of Court 2012, an application to vary an order or judgment must be made within 30 days of receipt of the order or judgment; (iii) that the instant application to amend the order dated 6 July 2006, which was made seven years after entry of the judgment, if granted, would prejudice the defendant; and

(iv) that since the order of Yew Jen Kie JC had been affirmed by the Court of Appeal and the Federal Court, it was too late to apply 'to extract the (draft order) under the guise of clarification'.

[11] Against the judgment of Douglas Cristo Primus Sikayun JC dated 18 September 2013, the plaintiff appealed to the Court of Appeal. In its judgment (see *Yung Chen Wood Industries Sdn Bhd v Scott & English (M) Sdn Bhd* [2016] 12 MLJ 180), the Court of Appeal remarked that Douglas Cristo Primus Sikayun JC overlooked that Linton Albert J had prepared the following short judgment after his clarification of his order dated 6 July 2006:

> [21] It is pertinent to note that the learned judge did prepare a short judgment after the clarification of the order. We produced below the short judgment:
>
> > Is the plaintiff entitled to the reliefs sought in the statement of claim together with general damages to be assessed as submitted in the plaintiff's opening statement.
> >
> > Insofar as prayers (ii) and (iii) are concerned, I am of the view that it would be fair for the defendant to replace an additional general set to make up the deficit of the two old generator sets instead of replacement of two new generator sets taking into account that the two said generator sets had been used for quite some time.
> >
> > For the reasons aforesaid, I order that the defendant do within one (1) month from the date of this judgment, supply install and set-up in running condition at the plaintiff's factory another new generator set of producing at least 100KW (?) to make up the deficit of the two said generator sets at the defendant's costs and damages to be assessed by the deputy registrar and costs to be taxed unless agreed.
> >
> > Order accordingly.
> >
> > Signed. YA Tuan Linton Albert J

[12] At paras [24]–[25] of its judgment, the Court of Appeal held that prayers (ii) and (iii) of the amended statement of claim were never abandoned, and that the draft order reflected the decision of Linton Albert J after the clarification exercise. And at para [28] of its judgment, the Court of Appeal agreed with the plaintiff's submission that the assessment so far undertaken by the learned DR was 'about damages suffered by the plaintiff on extra fuel cost resulting from the two defective generator sets which were supplied by the defendant ... the damages on the cost of replacing and installing a new generator set of 1,000kw' as ordered by the learned trial judge Linton Albert J had not been considered or assessed:

> [28] We agree with this submission by learned counsel for the plaintiff. We have carefully scrutinised the ruling by the deputy registrar on the assessment of damages delivered on 8 January 2008. We are satisfied that in the assessment of damages the deputy registrar was dealing mainly with the plaintiff's claim for the cost of extra diesel used (see pp 32–34 and p 38 of the supplementary appeal record). Likewise

when the said ruling on the award by the deputy registrar was appealed to judge in chambers, the learned judicial commissioner then was only concerned with evidence by the plaintiff to prove the extra fuel cost and set aside the award of RM3,382,222.09 awarded by the deputy registrar — (see pp 121–124 appeal record).

[13] The Court of Appeal held the firm view that Linton Albert J had granted prayers (ii) and (iii) of the amended statement of claim, and that the learned DR and Yew Jen Kie JC had not considered prayers (ii) and (iii):

[29] Going back to the first sealed order of the judgment by the trial judge after the clarification, it is without doubt that reading the order, the trial judge's intention was to grant the plaintiff's prayers (ii) and (iii) of its statement of claim. The effect therefore is that the defendant is required to replace two defective generator sets with two brand new ones. It follows that if the defendant is unable to do so then the assessment of damages must reflect the cost suffered by the plaintiff in replacing and installing the new set of generators on their own. But this alternative prayer was never considered by the learned deputy registrar in her assessment of damages or for that matter, by the learned judicial commissioner who heard the appeal in chambers.

[14] Finally, on the power of the court to amend the order dated 6 July 2006, the Court of Appeal held that the case of *Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417 supported the proposition that the court has the discretion to amend any orders at any time to reflect what had been ordered in fact, that it is established principle that the court has inherent power to vary its own orders so as to carry out its own meaning and to make its meaning plain (the Court of Appeal cited *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] 3 All ER 129; [1955] P 272 (CA), *Pearlman (Veneers) SA (Pty) Ltd v Bartels* [1954] 3 All ER 659; [1954] 1 WLR 1457 and referred to the *Supreme Court Practice 1993* (Vol 1, Part 1, London Sweet & Maxwell)), and that in *Henry William Hatton v Hugh Harris* [1892] AC 547, Lord Watson said: 'Where an error of that kind has been committed it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in Order to bring in harmony with the Order which the judge obviously meant to pronounce'.

[15] For those reasons, the Court of Appeal allowed the plaintiff's appeal and amended the order dated 6 July 2006, as per the draft order.

[16] Against the decision of the Court of Appeal, the defendant obtained leave to appeal to the Federal Court on the following 'questions of law':

(a) whether the time stipulated in O 42 r 13 of the Rules of Court 2012 for amending or varying a judgment or order is a mandatory provision? and

A (b) whether a judgment creditor is estopped from amending or varying a judgment after it had executed on the original judgment or order?

[17] As said, we allowed the appeal and set aside the order of the Court of Appeal. But before we touch on the primary reason for our reversal of the B decision of the Court of Appeal, we see it fit to make the following observations that pertained to the Court of Appeal's findings of fact: (i) that the assessment so far undertaken by the learned DR was 'about damages suffered by the plaintiff on extra fuel cost resulting from the two defective generator sets which C were supplied by the defendant'; and (ii) that prayers (ii) and (iii) had not been considered by the learned DR or by Yew Jen Kie JC.

[18] The Court of Appeal held that the assessment so far undertaken by the learned DR and Yew Jen Kie JC had to do only with the extra fuel cost. But D with respect, the Court of Appeal should have said that the learned DR and Yew Jen Kie JC only assessed the extra fuel cost. That was so because the plaintiff only claimed the extra fuel cost. In his opening address, learned counsel for the plaintiff reminded the learned DR that 'the judgment ordered that damages should reflect prayers (ii) and (iii)' (see p 107 of the appeal record) E and then invited the learned DR 'to make the appropriate orders, apart from the damages suffered for the increase in the consumption of diesel due to under performance of the two (2) generators supplied to the plaintiff'. In any case, that Linton Albert J had granted prayers (ii) and (iii) did not escape the learned DR. In his grounds of decision, the learned DR carefully recited 'on 6.7.2006, F Linton Albert J ... granted judgment (to) the Plaintiff with damages to be assessed to reflect prayers (ii) and (iii) ...' (see p 178 AR). Thereafter his short survey of the law relating to s 74 of the Contracts Act 1950, the learned DR narrated that 'the Plaintiff urged the court to award damages to the Plaintiff on the basis that the Plaintiff incurred loss by having to pay more for diesel due to G the under performance of the two (2) generators supplied by the Defendant to the Plaintiff' (see p 181 AR) and that the plaintiff 'prayed for an award of RM3,382,222.09' to account for the extra fuel cost (see pp 181 AR–183AR). It could not be denied that Linton Albert J ordered 'judgment be entered against the Defendant and damages be assessed by the Deputy Registrar to H reflect prayers (ii) and (iii) ...'. But when damages were assessed, the plaintiff only claimed and quantified the extra fuel cost. To all intents and purposes, the plaintiif no longer pursued prayers (ii) and (iii). Thus, there was no reason for the learned DR to assess damages as ordered. But if the learned DR were wrong in his assessment, the plaintiff should appeal against his order. But given that it I had not appealed against, the plaintiff could not be heard to complain that prayers (ii) and (iii) were not considered.

[19] Only the defendant appealed to judge in chambers against the order of the learned DR. At the appeal before judge in chambers, prayers (ii) and (iii)

were not raised by the plaintiff in its written submission (see p 123 AR). Yew Jen Kie JC ruled that the learned DR did not exceed his jurisdiction in awarding damages of RM3,382,222.09 to the plaintiff, but held that the plaintiff had not proved the extra fuel cost. However, Yew Jen Kie JC ordered the defendant, who had offered 'to compensate RM264,000.00 to restore the Plaintiff to its original position as if the contract had been perfectly performed', to pay RM264,000 to the plaintiff.

[20] As said, against the order of Yew Jen Kie JC, the plaintiff appealed to the Court of Appeal. When its appeal (S-02–800 of 2006) was dismissed by the Court of Appeal, the plaintiff applied to the Federal Court for leave to appeal. But when the Federal Court refused leave to appeal, all litigation that pertained to the order of Yew Jen Kie JC had run its entire course (see *Ooi Bee Tat @ Ooi Bee Lee v Ooi Bee Tat & Sons Sdn Bhd & Anor* [1999] 5 MLJ 10). There was no appeal beyond the Federal Court. The plaintiff had exhausted all possible appeals. The order of Yew Jen Kie JC became final and conclusive (see *Tiew Kun @ Tiew Boon Eu v Tneu Seng Bee & Ors and another appeal* [2010] 2 MLJ 213). By the same token, when the Federal Court refused leave to the defendant to appeal, the order of Linton Albert J became final and conclusive. Both the orders of Linton Albert J and Yew Jen Kie JC were amenable to the doctrine of res judicata. 'Literally translated, res judicata is 'the fact has been decided'. It expresses a general public interest policy that the same issue (or cause of action) should not be litigated more than once even if the parties are different. It prevents vexatious litigation and any abuse of the courts' process on the premise that final judgments are binding and conclusive (see *Henderson v Henderson* [1843-60] All ER Rep 378; (1843) 3 Hare 100)' (*Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788, per Abdull Hamid Embong JCA, as he then was, delivering the judgment of the court). Since finally adjudged, the orders of Linton Albert J and Yew Jen Kie JC became the truth between the plaintiff and defendant (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189).

[21] All litigation must come to an end. The plaintiff could not relitigate the orders of Linton Albert J and Yew Jen Kie JC. We agree with Douglas Cristo Primus Sikayun JC that when the order of Linton Albert J was sealed, the High Court became functus officio, save and except to correct 'clerical mistakes in the judgment or orders, or errors arising therein from any accidental slip or omission' (see O 20 r 11 of the Rules of Court 2012). Order 20 r 11 'is not at all encompassing and it is restricted to certain cases where there has been a clerical mistake or error arising from accidental slips or omissions by court officers (*In Re Gist (a person of unsound mind)* [1904] 1 Ch 398) and the parties themselves (*Armitage v Parsons* [1908] 2 KB 410)' (*Malaysia Borneo Finance Corp (M) Bhd v Malayan Produce Co Sdn Bhd & Anor* [2000] 5 MLJ 352 per

A Abdul Malik Ishak J, as he then was). 'Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O 28 r 11 of the Rules of the Supreme Court 1957 (O 20 r 11 of the Rules of the High Court 1980) so far as is necessary to correct errors in B expressing the intention of the court: *In Re St Nazaire Company* (1879) 12 Ch D 88, *Kelsey and Others v Doune* [1912] 2 KB 482; *Hession v Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the C original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v Neotia and Company* [1918] AC 888 and *Jonesco v Beard* [1930] AC 298. The hearing of the action will in a proper case be expedited: *Gordon-Smith v Peizer* (1921) 65 Sol Jo 607' (*Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 per Chang Min Tat FJ, delivering the D judgment of the court).

[22] The draft order which proposed wholesale changes to the order of Linton Albert J was clearly and visibly not within the ambit of 'clerical mistakes E or errors arising therein from any accidental slip or omission'. Even so, the Court of Appeal held that *Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd, Thynne v Thynne, Pearlman (Veneers) SA Pty Ld v Bernhard Bartels*, and *Henry William Hatton v Hugh Harris* supported the proposition that the order of Linton Albert J could be amended as per the draft order. Unfortunately, the F Court of Appeal failed to appreciate that the amendments sought and granted in those cases were mere corrections which did not affect the substantive judgment or order, and that the power to amend a sealed order is very limited.

[23] In *Thynne v Thynne*, the parties, who secretly married on 8 October G 1926 at St Paul's Church, Knightsbridge, went through a second ceremony of marriage on 27 October 1927 at St Martin-in-the-Fields. In her petition for divorce, the petitioner averred that she was married to the respondent on 27 October 1927. A decree nisi was pronounced and made absolute. Subsequently, the petitioner sought leave to amend her petition and decrees H nisi and absolute, to reflect that she had been lawfully married to the respondent on 8 October 1926 at St Paul's Church, Knightsbridge. She sought to substitute in the petition and decrees the date and place of the marriage of 8 October 1926, for that of the ceremony of 27 October 1927. The sought amendment was granted.

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[24] In *Pearlman (Veneers) SA (Pty) Ltd v Bartels*, the name of the defendant was, by amendment, altered to Joseph Bartels, trading as Bernhard Bartels.

[25] In *Henry William Hatton v Hugh Harris*, 'in 1842, a judgment was

obtained by B against a debtor upon a bond for £1,000 conditioned for payment of £500 and interest. A bill in equity having been filed by other judgment creditors a decree was made in 1853 confirming the Master's report that there was then due to B. under the judgment the sum of £500 with the interest then accrued, and declaring that that sum and the sums found by the Master's report to be due to other creditors with interest 'until paid' were well charged upon the debtor's lands. Part of the lands was sold in 1856 under an order of the Incumbered Estates Court (Ireland) but there were not sufficient funds to pay B. In 1891 moneys derived from the sale of lands being found in Court to the credit of the cause, B's representative applied to have the principal and interest then amounting to more than £1,000 paid out to him. The next incumbrancer objected that no more ought to be paid to the applicant than the penal sum of £1,000'. It was held, 'that B's charge upon the lands ought not to have been extended beyond the penalty to the prejudice of a subsequent incumbrancer; that there was obviously in the decree of 1853 an error arising from an accidental omission, and that under Order XXVIII r 11 of the Rules of the Supreme Court (Ireland) 1891 the decree should on a proper application be corrected by inserting the words 'the principal sum and interest not to exceed the amount of the penalty on the bond".

[26] In *Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd*, the order in question was not sealed or extracted. The application was not to amend but to set aside the order in question. Peh Swee Chin J, as he then was, explained that the power to review a sealed order is narrow:

> Now, a very significant factor which was not in dispute was that the order in question had never been extracted and perfected. This factor made a great deal of difference.
>
> In my view, before an order has been perfected, the court has inherent jurisdiction to review the matter. Please see *Re Harrison's Settlement* [1955] 1 All ER 185, *Re St Nazaire Co* (1879) 12 Ch D 88, *Re Thomas* [1911] 2 Ch 389 *Chua Wah Keow v Ng Ho Huat* [1961] MLJ 321. This power is exercisable whether it is an order made in open court or in chambers, or whether order is by consent; please see *Huddersfield Banking Co Ltd v Henry Lister* [1895] 2 Ch D 273, or otherwise so long the order has not been perfected, ie drawn up, passed and entered. I may just as well mention that when an order is extracted or perfected, the court can still review the same but only with the consent of both parties, or as expressly provided by the Rules of the High Court 1980 to give a few examples, in cases of setting aside judgment in default of appearance under O 13 r 9; setting aside judgment in default of pleadings under O 19 r 9; setting aside judgment in default of appearance at the hearing under O 14 r 11; or under O 20 r 11 where the order does not correctly set out the manifest intention of the court. The examples given are only a few of the examples to be found in the Rules of the High Court 1980.

[27] None of the aforesaid authorities relied by the Court of Appeal supported the proposition that the sealed order of Linton Albert J could be

amended as per the draft order. Indeed, there could not be an authority to the effect that a trial court could amend its order after that order has been affirmed or reversed by a higher court. There would be total mayhem in the judicial system if a lower court could amend an order affirmed by a higher court. The position is that unless appealed against, an order of a trial court stands final, binding and conclusive as pronounced by the trial court. If appealed against, an order of the trial court stands final, binding and conclusive as pronounced by the higher or highest court.

[28] In para [2] of its judgment, the Court of Appeal noted that the defendant's application for leave to appeal, in effect, against the order of Linton Albert J was dismissed by the Federal Court on 13 May 2009. With leave refused, the order of Linton Albert J was final, binding and conclusive as affirmed by the Federal Court. Douglas Cristo Primus Sikayun JC was absolutely right to refuse the plaintiff's application to amend the order of Linton Albert J. The Court of Appeal acted out of jurisdiction when it allowed the order of Linton Albert J as affirmed by the Federal Court to be reopened. Had the order of Linton Albert J not been affirmed by the higher or highest court, we would not say that the Court of Appeal acted out of jurisdiction, that is, even if we could not agree with its decision. But the order of Linton Albert J, albeit granted at first instance by Linton Albert J, was no longer the order of a court lower in hierarchy to the Court of Appeal. For once affirmed by the highest court, the order of Linton Albert J demanded the respect and obedience by all parties and even all courts. The Court of Appeal had no jurisdiction to disturb the order of Linton Albert J as affirmed by the highest court. Primarily, for that reason, also to put it right, we allowed the appeal, set aside the order of the Court of Appeal dated 19 May 2014 and restored the order of Douglas Cristo Primus Sikayun JC dated 18 September 2013.

[29] When we pronounced our decision, we declined to answer the leave questions, for they failed, as submissions from both counsel also failed, to capture the evident question — whether the doctrine of stare decisis applied. We surmised that leave must have been given to appeal to enable the correction of a blatant error.

Appeal allowed; Court of Appeal's decision set aside and order of the High Court restored.

Reported by Ashok Kumar